Supreme Court, U.S.
FILED
JUL 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

90-167
No. _____

In The
Supreme Court of the United States

October Term, 1990

JOEL EDWARD FREEDLAND,
Petitioner.

v.

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

– AND APPENDICES –

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QUESTION PRESENTED

WHETHER AN ACCUSED'S FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES IS VIOLATED WHEN A PROSECUTOR SEEKS AND OBTAINS A GRAND JURY SUBPOENA AND SEIZES DOCUMENTS PURSUANT TO THAT SUBPOENA, WITHOUT THE INTENTION OF PRESENTING THE DOCUMENTS TO THE GRAND JURY, AND THEN USES THE DOCUMENTS AS THE BASIS FOR PROCEEDING CRIMINALLY AGAINST THE ACCUSED, THEREBY BYPASSING THE CONSTITUTIONAL WARRANT REQUIREMENT?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties.[1]

[1] Defendant Griggs Clinic, P.C., is dissolved.

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OPINIONS BELOW

The opinion of the Michigan Court of Appeals dated April 29, 1986, is unreported and is reprinted at Appendix ("App.") A-1. The opinion of the Michigan Court of Appeals dated August 7, 1989, is reported at 178 Mich. App. 761; 444 N.W.2d. 250 and is reprinted at App. B-1. The opinion of the Recorder's Court for the City of Detroit is not reported and is reprinted at App. E-1.

JURISDICTION

Petitioner's conviction was affirmed by the Michigan Court of Appeals on August 7, 1989. A timely Application for Leave to Appeal was filed in the Michigan Supreme Court. The Michigan Supreme Court denied the Application on April 24, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On February 8, 1982, a grand jury subpoena duces tecum was issued at the request of an Assistant Attorney General for the State of Michigan, and served on Petitioner Joel Edward Freedland, D.O., and Defendant Griggs Clinic, P.C., located in Detroit, Michigan. App. G-1. The subpoena commanded Petitioner Freedland to appear before the grand jury and to produce specified patient files and records of the Griggs Clinic. In obedience to the subpoena, Petitioner produced the requested files and records and forwarded them to the grand jury on February 16, 1982. The Assistant Attorney

General, however, never submitted the case to the grand jury. Rather, on April 28, 1982, the Assistant Attorney General sought and obtained from the grand jury an authorization for the release of the subpoenaed records for use in a criminal prosecution of Defendants. App. H-1.

On that same date, April 28, 1982, the Assistant Attorney General filed a criminal complaint against Petitioner Freedland and Defendant Griggs Clinic. Following a preliminary examination, the Defendants were bound over to the Recorder's Court for the City of Detroit on eighty counts of violating the State of Michigan's Medicaid False Claim Act. Mich. Comp. Laws § 400.601, *et seq.* The Assistant Attorney General subsequently filed an information reducing the number of counts against Defendants to sixty-four.

Prior to trial, Defendants moved to suppress all evidence and fruits obtained through the issuance of the grand jury subpoena. Defendants argued that the Assistant Attorney General abused the grand jury's power by issuing a subpoena for various records, when, in fact, there was no intention to submit the evidence to the grand jury. By doing so, the Assistant Attorney General was able to frustrate the protections of the Fourth Amendment by, in effect, seizing evidence without a warrant.

On June 26, 1984, the Recorder's Court for the City of Detroit issued an opinion and order granting Defendants' Motion to Suppress Evidence. The court accepted Defendants' contention that "the prosecution subpoenaed the documents . . . without any legitimate grand jury purpose in mind." App. E-5. Based on the foregoing, the court held:

> The aspect of this case which triggers the most concern derives from the fact that the prosecution

> through its use of the grand jury was able to obtain from the defendants evidence against them which it could not have obtained by means of a search warrant which would have required a showing of probable cause before a magistrate who was duly authorized, upon such showing, to issue a search warrant. In the opinion of this Court, this constituted a violation of . . . the Fourth Amendment to the Federal Constitution . . . which undertake[s] to protect our citizens from unreasonable search and seizure. App. E-6.

The Attorney General appealed to the Michigan Court of Appeals. In an unpublished opinion, issued on April 29, 1986, the Michigan Court of Appeals reversed. App. A-1. Although the court viewed the procedure used by the Assistant Attorney General "with disfavor," App. A-7, it found no violation of a protected Fourth Amendment privacy interest. The court reasoned that because medicaid providers are statutorily required to maintain records and make those records available for examination by the Attorney General, Mich. Comp. Laws § 400.111b, Defendants had no reasonable expectation of privacy in the records released by the grand jury. App. A-6.

Defendants filed an Interlocutory Application for Leave to Appeal to the Michigan Supreme Court. On September 24, 1986, the Michigan Supreme Court denied leave to appeal, Justice Charles L. Levin dissenting. App. C-1.

The case proceeded to a jury trial. Defendants were convicted on one count of conspiracy to defraud and twenty-two counts of medicaid fraud. By the time of sentencing, Defendant Griggs Clinic, P.C., was dissolved. Petitioner Freedland was fined $50,000.00 and sentenced

to five to ten years imprisonment for the conspiracy conviction and concurrent terms of two to four years imprisonment for the medicaid fraud convictions.

The Michigan Court of Appeals affirmed Defendants' conviction on August 7, 1989. In a published opinion, App. B-1, the Michigan Court of Appeals declined to review Defendants' claim that the trial court erred by allowing evidence at trial which was obtained in violation of the Fourth Amendment. The court held that appellate review was precluded by the law of the case doctrine and ruled that Defendants' only recourse was to seek leave to appeal to the Michigan Supreme Court. App. B-10.

Petitioner filed an Application for Leave to Appeal to the Michigan Supreme Court on August 22, 1989. Petitioner contended, inter alia, that his convictions should be reversed where the prosecution introduced evidence at trial seized in violation of Petitioner's Fourth Amendment rights. On April 24, 1990, the Michigan Supreme Court denied leave to appeal, Justices Charles L. Levin and Michael F. Cavanagh, dissenting. App. C-1.

REASONS FOR GRANTING THE WRIT

THE MICHIGAN COURT OF APPEALS HAS WRONGLY DECIDED AN IMPORTANT CONSTITUTIONAL QUESTION INVOLVING THE FOURTH AMENDMENT WARRANT REQUIREMENT WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This case presents a question of first impression: does the Fourth Amendment to the United States Constitution permit a prosecutor to use the grand jury's subpoena power to gather evidence and, rather than presenting that evidence before the grand jury, use the evidence as a basis for proceeding criminally against the accused by

way of complaint and warrant without a neutral and detached magistrate finding that there was probable cause to seize the evidence? Petitioner contends that, under the circumstances of this case, the subpoena duces tecum was an improper substitute for a search warrant and therefore was an "unreasonable" search and seizure within the meaning of the Fourth Amendment.

A. Grand Jury Subpoenas Are Subject To Minimal Fourth Amendment Limitations.

It is long settled that the grand jury subpoena duces tecum, the process by which the production of evidence is compelled to aid grand jury investigations, is subject to only very minimal Fourth Amendment limitations. *Hale* v. *Henkel*, 201 U.S. 43, 76-77 (1906); *Boyd* v. *United States*, 116 U.S. 616, 633-35 (1886). In *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208 (1946), this Court said that "the Fourth [Amendment], if applicable [to subpoenas for the production of business records and papers], at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described,' if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant," as quoted in *United States* v. *Miller*, 425 U.S. 435, 445-446 (1976). These minimal protections, however, have no application to the facts of this case.[1]

In this case, Petitioner does not contend that the Grand Jury subpoena was, on its face, objectionable.[2]

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[1] Petitioner does not contend that the grand jury subpoena failed to comply with the requirements outlined in *Oklahoma Press Publishing Co.* v. *Walling*.

[2] Thus, in obedience to the subpoena, Petitioner complied and surrendered the subpoenaed records to the grand jury. Petitioner had no reason, at that time, to believe that any grounds for an objection existed.

Rather, Petitioner contends that the manner in which the subpoena was used violated the Fourth Amendment. The trial court determined that the Assistant Attorney General had no intention of presenting the seized records to the grand jury. Petitioner contends that the Assistant Attorney General used the grand jury subpoena power to gather criminal evidence, thus making an "end run" around the Warrant Clause of the Fourth Amendment. Petitioner submits that the Fourth Amendment prohibits a prosecutor from using the grand jury subpoena power as a tool to gather criminal evidence, absent a warrant issued by a neutral and detached magistrate upon probable cause.

B. Petitioner Had A Reasonable Expectation Of Privacy In His Medical Records.

The Michigan Court of Appeals viewed the procedures used by the Assistant Attorney General "with disfavor." App A-7. Nevertheless, it held that because Petitioner was a medicaid provider and was statutorily required to maintain and keep records available for examination by the Attorney General,[3] Petitioner had no legitimate expectation of privacy in the records surrendered. App. A-6, A-7. The Court of Appeals' rationale is flawed in several respects.

First, Petitioner had not been a participant in the medicaid program since October 9, 1981, approximately four months prior to the issuance of the subpoena duces tecum.[4] Second, the statutory sanctions for refusing to provide records for inspection by the Attorney General

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[3] Mich. Comp. Laws § 400.111b.

[4] In his Statement of Facts, p. 2 of the Attorney General's Brief on Appeal in the Michigan Court of Appeals, filed January 14, 1985, the Attorney General acknowledges that Petitioner had been "suspended . . . from participation in the Medicaid Program" at the time.

include probation, suspension, or denial or termination of the provider's participation in the program. There is no provision in the statute for a warrantless seizure of records by the Attorney General if the medicaid provider refuses to turn the records over voluntarily. Mich. Comp. Laws § 400.111d and e.

Furthermore, even if the medicaid statute was applicable, Petitioner's subjective expectation of privacy in his records was not relinquished. The Fourth Amendment protects commercial premises as well as private homes. *Camara* v. *Municipal Court*, 387 U.S. 523, 528-529 (1967); *See* v. *City of Seattle*, 387 U.S. 541, 543, 546 (1967). In *See*, this Court stated:

> The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by warrant. [387 U.S. at 543]

This Court recently reaffirmed that an owner or operator of a business has an expectation of privacy in commercial property which society is prepared to recognize as reasonable. *New York* v. *Burger*, 482 U.S. 691, 699 (1987). To be valid, administrative searches generally require a warrant. *Michigan* v. *Clifford*, 464 U.S. 287, 291 (1984). While only a *reduced* expectation of privacy is recognized in "closely regulated industries," *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 313 (1978),[5] warrantless

[5] *Marshall* held that warrantless searches by the Occupational Safety and Health Review Commission pursuant to statute were unconstitutional. Administrative regulations requiring certain records to be maintained and open to inspection do not infringe on individual rights to the extent that warrantless searches would if allowed.

searches are considered reasonable only where a "'substantial' government interest" informs the regulatory scheme, the search is "'necessary to further [the] regulatory scheme'", and the regulatory statute "advise[s] the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *New York* v. *Burger*, 482 U.S. at 699.

In this case, the Assistant Attorney General did not perform an administrative search pursuant to Michigan's medicaid statute,[6] but conducted a seizure of criminal evidence. This Court holds that any use of an administrative search as a means of criminal investigation, absent a warrant, is forbidden. *Michigan* v. *Clifford*, 464 U.S. at 294. Further, Petitioner's compliance with the grand jury subpoena was an "acquiescence to a claim of lawful authority," *Bumper* v. *North Carolina*, 391 U.S. 543, 549 (1968), and not a voluntary relinquishment of his privacy right.

Accordingly, under the commercial property doctrine, Petitioner retained a reasonable expectation of privacy in his medical records.

C. The Assistant Attorney General's Use Of The Grand Jury Subpoena Duces Tecum Was An Unreasonable Search And Seizure.

The question remains whether the Assistant Attorney General's use of the grand jury subpoena duces tecum to seize Petitioner's medical records, without the intervention of a neutral and detached magistrate, was "unreasonable" within the meaning of the Fourth Amendment.

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[6] Petitioner does not challenge the adequacy of the inspection procedures provided in the Michigan Social Welfare Act.

In *United States* v. *Ross*, 456 U.S. 798, 824-825 (1982), this Court stated:

> We reaffirm the basic rule of Fourth Amendment jurisprudence stated by Justice Stewart for a unanimous Court in *Mincey* v. *Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 [1978]:
>
> "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.' *Katz* v. *United States*, 389 U.S. 347, 357 [88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967)] (footnotes omitted)."

What is reasonable, this Court holds, "'depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'" *Skinner* v. *Railway Labor Executives Ass'n*, ___ U.S. ___, 109 S.Ct. 1402, 1414 (1989) (quoting *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). The permissibility of a particular search or seizure is judged by balancing the intrusion on an individual's privacy against the competing governmental interest. *Id.* In criminal cases, however, this Court "strike[s] this balance in favor of the procedures described by the Warrant Clause of the Fourth Amendment." *Id.* (citing *United States* v. *Place*, 462 U.S. 696, 701 (1983)). In criminal cases, only "'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey* v. *T.L.O.*, 469 U.S. 325, 351 (1985)).

In *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), then-existing state law authorized the New Hampshire Attorney General to issue search warrants without the intervention of a neutral and detached magistrate. This Court ruled the procedure invalid:

> [T]here could hardly be a more appropriate setting than this for a *per se* rule of disqualification rather than a case-by-case evaluation of all the circumstances. Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule . . . [of the warrant requirement] is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations — the 'competitive enterprise' that must rightly engage their single-minded attention. [*Id.* at 450, footnote omitted.]

Under the circumstances presented here, the Assistant Attorney General similarly seized Petitioner's records without the intervention of a neutral and detached magistrate. Two primary functions of a grand jury are to determine probable cause and to protect citizens against unfounded criminal prosecutions. *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). Here, no detached grand jury considered the evidence, for there was no intention to present the seized records to the grand jury. As this Court recognized when it condemned Michigan's "one-man" grand jury system in *In re Murchison*, 349 U.S. 133, 136 (1954), "no man can be a judge in his own case."

Where, as here, the prosecutor manipulates the grand jury system to secure criminal evidence, even the minimal Fourth Amendment limitations on the subpoena power discussed in *Boyd*, *Hale*, and *Oklahoma Press* are no longer present. If the prosecution can seize medical records from a physician's office, sift through these

records, and make an independent decision to charge, minus the disinterested intervention of a judge or of citizens of the grand jury at any point in the process, the prosecution becomes "the judge of its own case" and the privacy rights of the accused are violated. Petitioner submits that the procedure used by the Assistant Attorney General, if allowed to stand, would reduce the Fourth Amendment to a nullity.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: July 18, 1990

APPENDIX TO PETITION FOR CERTIORARI

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APPENDIX A

[1986] OPINION

(State of Michigan — Court of Appeals)

(Dated April 29, 1986)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v JOEL EDWARD FREEDLAND and GRIGGS CLINIC, P.C., a professional corporation, Defendants-Appellees — No. 79865)

BEFORE: Mackenzie, P.J.,
and Cynar and H. E. Deming*, JJ.

PER CURIAM

Defendants were charged with multiple counts of violating the Medicaid False Claims Act, MCL 400.601 *et seq.*; MSA 16.614(1) *et seq.* The trial court granted defendants' motion to suppress evidence and dismissed all charges. The people appeal as of right. The narrow issue before us may be framed as follows: when a grand jury is discharged before issuing an indictment or no-bill and, upon its discharge, releases to the Attorney General records it obtained from defendants pursuant to a subpoena duces tecum for use in a criminal prosecution by complaint and warrant, are defendants' Fourth Amendment rights against unreasonable searches and seizures violated? We answer this question in the negative and reverse.

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* Circuit Judge, sitting on the Court of Appeals by assignment.

The facts of this case are basically undisputed. In 1981, the Medicaid Fraud Unit of the Attorney General's Office began an investigation of defendant Griggs Clinic, owned by defendant Freedland, after receiving an anonymous complaint that clinic physicians were fraudulently billing the Medicaid program. The case was taken to a grand jury. On February 8, 1982, at the Attorney General's request, the grand jury served a subpoena duces tecum on defendants seeking the medical files of 53 Medicaid patients, patient x-rays, and other Medicaid forms and documents. The records were produced by defendants on February 16, 1982, and were subsequently turned over to medical specialists outside the Attorney General's office for analysis.

The case was ready for presentation to the grand jury in mid-April 1982. However, the grand jury's second term was set to expire on April 28, 1982. Since there was no time to present the evidence to the grand jury before its term expired, the Attorney General decided to proceed with the case by complaint and warrant. On the last day of its term, the grand jury authorized the release of the subpoenaed records to the Attorney General for use in the prosecution of its case against defendants. The same day, the Attorney General filed a criminal complaint against defendants. Three co-defendants eventually pled no contest to reduced charges in exchange for their testimony against the defendants herein. After a 14-day preliminary examination spanning almost 7 months, defendants were bound over to Recorder's Court on 80 counts of violating the Medicaid False Claims Act. The Attorney General subsequently filed an information reducing the number of counts against defendants to 64.

Defendants filed several motions in Recorder's Court, including a motion to suppress evidence. On June 26,

1984, the trial court granted the motion in a written opinion which stated in pertinent part:

> "The aspect of this case which triggers the most concern derives from the fact that the prosecution through its use of the grand jury was able to obtain from the defendants evidence against them which it could not have obtained by means of a search warrant which would have required a showing of probable cause before a magistrate who was duly authorized, upon such showing, to issue a search warrant. In the opinion of this Court, this constituted a violation of not only the Fourth Amendment to the Federal Constitution but a violation of the Michigan Constitution as well. (See Const 1963, Art 1, Sec 11), both of which undertake to protect our citizens from unreasonable search and seizure.
>
> * * *
>
> " * * * This Court is constrained to hold, and does hold as a matter of law, therefore, that the use of the Grand Jury Subpoena to seize the records in question, absent the express approval of the supervising judge of the grand jury, was unlawful. Accordingly, it will order the same suppressed as evidence in this case."

On appeal, the people contend that the trial court erroneously ruled that the Attorney General's use of the records pursuant to the grand jaury subpoena amounted to a Fourth Amendment violation. We agree. We conclude that there was no governmental intrusion into an area in which defendants had a protected Fourth Amendment interest, so that the trial court erroneously granted defendants' motion to suppress. In reaching this conclusion, we examine defendants' inter-

ests at the two critical junctures in this case: first, when the grand jury subpoena duces tecum was served on defendants, and second, when the grand jury authorized the release of the subpoenaed records to the Attorney General.

A grand jury subpoena is not a "seizure" within the meaning of the Fourth Amendment. *United States* v *Mara*, 410 US 19, 21; 93 S Ct 774, 775-776; 35 L Ed 2d 99 (1973), citing *United States* v *Dionisio*, 410 US 1; 93 S Ct 764; 35 L Ed 2d 67 (1973). This is in large part because a subpoena lacks the abruptness, demeaning circumstances, and social stigma attached to a search and seizure. A subpoena is served in the same manner as other legal process and may be challenged before the subpoenaed documents must be produced. No officer or other person enters the subpoenaed party's premises against his will. The subpoenaing grand jury remains under the control and supervision of a court. See generally, *Dionisio, supra*, 410 US 9-10; *Oklahoma Press Pub Co* v *Walling*, 327 US 186; 66 S Ct 494; 90 L Ed 614 (1946). "This is not to say that a grand jury subpoena is some talisman that dissolves all constitutional protections". *Dionisio, supra*, 410 US 11. A grand jury subpoena cannot require the production by a person of private books that would incriminate him. *Boyd* v *United States*, 116 US 616; 6 S Ct 524; 29 L Ed 746 (1886). The Fourth Amendment provides protection against a grand jury subpoena duces tecum too sweeping "to be regarded as reasonable". *Hale* v *Henkel*, 201 US 43, 76; 26 S Ct 370, 379; 50 L Ed 652 (1905). In the context of the First Amendment, "[o]fficial harrassment of the press [by a grand jury] not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources" is prohibited. *Branzburg* v *Hayes*, 408 US 665; 92 S Ct 2646; 33 L Ed 2d 626 (1972). Additional grand jury subpoena safeguards are

also recognized. Use of a "forthwith" subpoena duces tecum is generally disapproved since it forecloses the opportunity to challenge it in court. See, *e.g.*, *In Re Nwamu*, 421 F Supp 1361 (SDNY, 1976). *Cf. United States* v *DiGilio*, 538 F2d 972 (CA 3, 1976), *cert den sub nom Lupo* v *United States* 429 US 1038 (1977). A grand jury subpoena may not be used to gather evidence for civil enforcement rather than for purposes of criminal investigation. See *In Re Grand Jury Subpoenas, April, 1978*, 581 F2d 1103 (CA 4, 1978), *cert den sub nom Fairchild Industries, Inc* v *Harvey* 440 US 971 (1979). Nor may the grand jury process be used by the prosecutor as a discovery device once a trial is pending. See, *e.g.*, *United States* v *Doe (Ellsberg)*, 455 F2d 1270 (CA 1, 1972).

In the instant case, no such infirmities in the grand jury subpoena duces tecum existed. Defendants have raised no Fifth Amendment challenge. We are not faced with a sweeping, "fishing expedition" subpoena as in *Hale, supra*. As in *Dionisio*, "even if *Branzburg* be extended beyond its First Amendment moorings and tied to a more generalized due process concept, there is still no indication in this case of the kind of harrassment that was of concern there". 410 US 12. No "forthwith" subpoena was used in this case. The subpoena was not used as part of a civil investigation, or to gather evidence after defendants' bind-over. Accordingly, we conclude that the grand jury properly obtained the challenged records from defendants. Defendants' Fourth Amendment interests were not violated at this stage of the proceedings.

If the challenged documents were not obtained by the grand jury in violation of defendants' Fourth Amendment interests, did the grand jury's release of the documents to the Attorney General without judicial

intervention elevate the production of the records to an unlawful governmental seizure contrary to the Fourth Amendment? Defendants contend, and the trial court ruled, that the combination of the issuance of the subpoena to obtain the challenged documents, the discharge of the grand jury before it made the indictment/no-bill decision, and the Attorney General's decision to proceed by complaint permitted the state to effect a seizure without a neutral magistrate's probable cause determination. We are not so persuaded.

Not all governmental intrusions constitute a "search and seizure" within the meaning of the Fourth Amendment. See *People* v *Nash*, 418 Mich 196; 341 NW2d 439 (1983). Hence, the initial inquiry in any Fourth Amendment challenge is whether, in fact, there was a search and seizure. The controlling test is whether the government's actions violated defendants' reasonable expectation of privacy. *Katz* v *United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967). If the answer is affirmative, then defendants' Fourth Amendment rights are implicated and the attendant safeguards which the trial court found lacking in this case are triggered.

An expectation of privacy for purposes of the Fourth Amendment is legitimate if the individual has an actual, subjective expectation of privacy and that actual expectation is one which society recognizes as reasonable. *Nash, supra*, p 205, citing *United States* v *Knotts*, 460 US 276; 103 S Ct 1081; 75 L Ed 2d 55 (1983). We must examine the nature of the particular documents sought to be suppressed in order to determine whether there is a legitimate expectation of privacy concerning their contents. *United States* v *Miller*, 425 US 435, 442; 96 S Ct 1619, 1623; 48 L Ed 2d 71 (1976).

We cannot perceive a legitimate expectation of privacy in the contents of the records released by the

grand jury to the Attorney General in this case. Defendants were required to produce pursuant to the subpoena duces tecum "records, notes, papers, writings, files or memoranda which pertain to the diagnosis and/or treatment" of 53 named patients. In our opinion, a Medicaid provider's lack of any legitimate expectation of privacy in this information is manifest in the Legislature's enactment of § 116 of the Social Welfare Act, MCL 400.111b; MSA 16.490(21b). That section requires Medicaid providers to maintain records necessary to fully document the extent of services provided and to substantiate the medical necessity for claimed treatment, and to make available such records for examination and photocopying by the Attorney General. In light of this statutory requirement, we conclude that defendants could not harbor an actual expectation of privacy in the disputed records, nor that society would recognize such an expectation as reasonable. Accordingly, we do not believe that any governmental intrusion regarding the records constituted a search and seizure within the meaning of the Fourth Amendment.

Because, in our opinion, this case does not present a governmental intrusion into an area in which defendants had a protected Fourth Amendment interest, we conclude that the trial court erred in finding a Fourth Amendment or Art 1, § 11 violation on these facts. Although we view the Attorney General's procedure in the case with disfavor, we are unable to find support for the trial court's wholesale condemnation of that procedure on the record before us.

Finally, we briefly address plaintiff's argument that even excluding the subpoenaed records, the remaining evidence adduced at defendants' preliminary examination was sufficient to support the 64-count information. While we cannot agree with plaintiff that absent

the challenged documents there existed sufficient evidence to bind over defendants on all 64 counts, we have carefully reviewed the preliminary examination transcripts in this case and conclude that the trial court erred in dismissing outright the information against defendants. In our opinion, there was sufficient evidence on each element of the crime charged under counts 1-12, 14-21, 24-33, 39-50, and 55-59 to support defendants' bindover. Thus, even if we were to agree with the trial court's ruling on defendants' motion to suppress, we would still be constrained to reverse the court's further decision to strike the 47 above-enumerated counts.

Reversed and remanded. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie
/s/ Walter P. Cynar
/s/ Hudson E. Deming

APPENDIX B

[1989 MAJORITY] OPINION

(State of Michigan — Court of Appeals)

(Dated August 7, 1989)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JOEL FREEDLAND, Defendant-Appellant and GRIGGS CLINIC, P.C., Defendant — No. 99983)

Before: Doctoroff, P.J.,
and Shepherd and R. R. Lamb,* JJ.

SHEPHERD, J.

Defendants Dr. Joel Freedland and the Griggs Clinic, P.C., were tried jointly on charges of conspiracy to commit Medicaid fraud, MCL 400.606; MSA 16.614(6), and Medicaid fraud, MCL 400.607; MSA 16.614(7). The other alleged co-conspirators, Drs. Tocco and Kelly, entered guilty pleas to lesser charges in exchange for their testimony against defendants. A jury found defendants guilty of one count of conspiracy and twenty-two counts of Medicaid fraud. By the time of sentencing, the clinic was dissolved. Defendant Freedland was fined $50,000 and sentenced to five to ten years' imprisonment for the conspiracy conviction and concurrent terms of two to four years' imprisonment for the Medicaid fraud convictions. Defendant appeals by right, challenging the jury instructions and raising one evidentiary issue. We affirm.

During 1981, Drs. Tocco and Kelly submitted false Medicaid claims to the state for x-ray and osteopathic

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* Circuit Judge, sitting on the Court of Appeals by assignment.

manipulative therapy (OMT) services provided at the Griggs Clinic. The clinic's services included a large low back pain practice. It was operated by Dr. Freedland, who hired Drs. Tocco and Kelly and instructed them on the protocol to follow for all new patients. From a technical standpoint, both doctors understood that they could deviate from the protocol. However, Dr. Tocco testified that it was clear that he was expected to order all procedures in the protocol and Dr. Kelly testified that she did not think she could stay employed by defendant if she consistently deviated from the protocol.

The new patient protocol required prescribing Talwin and Valium for outpatients, on whom a full set of x-rays, numerous diagnostic laboratory tests and procedures (the comprehensive profile), and an OMT would be done and billed to Medicaid. An OMT is a technique used to correct abnormal bodily motions or restrictions by manipulating muscles, joints, etc. When Dr. Kelly applied for the job in 1981, she was near bankruptcy. Dr. Kelly twice informed defendant that she did not feel qualified to do OMTs and was told she would not have to do so. She was also advised that she need not apply if she had a problem prescribing a lot of Talwin and Valium. Once hired, Dr. Kelly ordered the protocol for new patients even when not medically necessary. Two week prescriptions of Talwin and Valium were given to every patient. Dr. Kelly only performed OMTs once or twice, but she charted OMTs for every patient because it was clear that defendant expected her to do so. At one point, Dr. Kelly discussed the lack of OMTs with defendant, who responded "What is an OMT anyway? . . . A patient walks into a room. You follow them. You watch their head follow you and you watch the range of motion in their neck."

Dr. Tocco, who was hired in 1980, similarly testified that he was instructed to and did order the protocol for all new patients, even if unnecessary. Defendant told him to write up a diagnosis to justify ordering the tests. Dr. Tocco performed very few OMTs because he had very little use of his left arm and wore a wrist brace, but charted that he performed the OMT anyway. Dr. Tocco claimed that he ordered unnecessary services and billed for procedures not done because defendant wanted him to and he liked the money he was paid to do it.

Both Drs. Tocco and Kelly were hired at a salary of $78,000, which was paid by the clinic. For purposes of billing Medicaid, however, Drs. Tocco and Kelly enrolled in the Medicaid program individually pursuant to defendant's instructions. They were issued individual provider identification numbers by the state and both authorized a third-party billing service to submit Medicaid claims to the state on their behalf. Under this arrangement, Drs. Tocco and Kelly completed patient charts and indicated the services performed for the Medicaid patients. The patient charts were reviewed by billing clerks and the billing information transferred to forms provided by the third-party service. The forms were given to the third-party service which then put the information on a computer tape. The tape was sent to Medicaid, which processed the information and issued state treasury warrants made payable to Dr. Tocco or Dr. Kelly, in care of defendant, for services rendered. Defendant's office manager received the warrants, used signature stamps of Drs. Tocco and Kelly to endorse their respective warrants, and deposited the warrants into the clinic's bank account.

According to Corrine McCall, one of the clinic's billing clerks, defendant instructed her directly regarding

how to bill for certain procedures and patients. On one occasion, McCall was instructed to bill complete spinal x-rays as four separate x-rays instead of one complete procedure because of its more favorable Medicaid reimbursement. On another occasion, when Medicaid lowered the amount that it would pay for some testing, defendant took the time to find out which tests would be paid at a higher rate and changed the comprehensive profile to include them. Another billing clerk, Lola Holton, testified that defendant instructed her concerning OMT billings "to note that everyone that comes through the door would have their neck cracked and make sure I bill it."

The conspiracy and fraud statutes[1] underlying defendant's convictions provided that:

> (1) A person shall not enter into an agreement, combination, or conspiracy to defraud the state by obtaining or aiding another to obtain the payment or allowance of a false, fictitious, or fraudulent claim under Act No. 280 of the Public Acts of 1939, as amended. [MCL 400.606; MSA 16.614(6).]
>
> (1) A person shall not make or present or cause to be made or presented to an employee or officer of the state a claim under Act No. 280 of the Public Acts of 1939, as amended, upon or against the state, knowing the claim to be false, fictitious, or fraudulent. [MCL 400.607; MSA 16.614(7).]

The prosecutor's theory was that defendant conspired with employees of the clinic to defraud Medicaid by means of the protocol he devised, that defendant knew

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[1] The statutes were subsequently amended by 1984 PS 333 to delete the "fictitious or fraudulent" language.

that various procedures and testing in the protocol were either medically unnecessary or were not performed, that Drs. Tocco and Kelly implicitly agreed to further the conspiracy by falsifying records, and that defendant caused Medicaid claims to be submitted by Drs. Tocco and Kelly with knowledge that the claims were false. The defense was that defendant instituted safeguards at the clinic to insure that services being billed were actually performed, that the work done at the clinic was medically necessary, and that defendant had no knowledge that the claims submitted by Drs. Tocco and Kelly were false.

I

On appeal, defendant claims that the instructions given to the jury on two statutory rebuttable presumptions allowed in Medicaid fraud cases requires reversal. Since defendant did not object to the instructions, relief will be given only if necessary to avoid manifest injustice to the defendant. *People* v *Kelly*, 423 Mich 261, 272; 378 NW2d 365 (1985). In deciding whether manifest injustice occurred, we review the instructions as a whole. Our responsibility as a reviewing court is to balance the general correct, clear tenor of the instructions in their entirety against the potential misleading effect of a single sentence isolated by a defendant. *Id.*, p 275.

The instructions on the rebuttable presumptions given in this case were taken from MCL 400.608; MSA 16.614(8) and preceded by general instructions on permissive presumptions and the standard of proof imposed on the prosecutor. Specifically, the court instructed that:

> A rebuttable presumption is an inference of fact based upon the existence of other basic established facts or circumstances.

A rebuttable presumption has the effect of evidence and may be used as evidence. You as jurors may but need not infer the existence of the presumed fact from the basic facts.

The prosecutor still has the burden of proof beyond a reasonable doubt of all of the elements of the offense.

* * * [Examples]

In these examples, the presumed facts may be used as evidence unless rebutted by competent evidence to the contrary.

* * *

I'm now going to instruct you on the rebuttable presumption you may utilize as evidence of the defendant's knowledge in this case.

It shall be a rebuttable presumption that a person knowingly made a claim for Medicaid benefit if the person's actual, facsimile, stamped, typewritten or similar signature is used on the form required for the making of a claim for Medicaid benefit.

If a claim for Medicaid benefit is made by means of computer billing, tapes or other electronic means, it shall be a rebuttable presumption that the person knowingly made the claim if that person has notified the Department of Social Services in writing that claims for Medicaid benefits will be submitted by use of computer billing, tapes or other electronic means.

It is important to note that defendant does not challenge the above instructions or the validity of the statutory presumptions, other than the use of the word

"shall," which defendant claims may have left the jury with the impression that the presumptions were mandatory. We find no merit in this argument. The use of the word "shall" merely informed the jury that the court's definition of the rebuttable presumption must be followed. Read in their entirety, the instructions clearly did not require the jury to utilize the presumptions as evidence, but merely suggested to the jury a possible conclusion to be drawn if the prosecutor proved certain predicate facts. Hence, the presumptions were permissive. See *Kelly, supra,* 273-274 n 4; *Francis* v *Franklin,* 471 US 307, 314; 105 S Ct 1965; 850 L Ed 2d 344, 353 (1985).

It is also important to note that defendant does not challenge the specific instructions given by the court on the intent and knowledge elements of the charged offenses. Defendant's principal attack on the jury instructions is based on the following statement made by the court immediately following the court's instructions on the knowledge element of the Medicaid fraud offense and immediately preceding the above-quoted instruction on the rebuttable presumptions. Specifically, the court stated:

> Now, because this is a prosecution for false claims under the Medicaid False Claims Act, *there are two rebuttable presumptions which you may consider on the issue of the intent of the defendants, knowledge required for establishing the knowledge, elements of the offenses charged.* [Emphasis added.]

Defendant claims that this prefatory statement misinterpreted the purpose of the presumption and may have persuaded a reasonable jury that the use of a computerized billing constituted proof beyond a reasonable doubt of defendant's intent and knowledge unless the

defendant persuaded the jury otherwise. In other words, defendant claims that the instructions had the effect of shifting the burden of persuasion to defendant.

A jury instruction that shifts the burden of persuasion to the defendant on the elements of the crime is erroneous because it violates a defendant's constitutional right to due process. *Kelly, supra,* 273-274 n 4; and see *People* v *Belanger,* 158 Mich App 522, 528-529; 405 NW2d 184 (1987). Whether or not a defendant has been accorded his constitutional rights depends upon the way that a reasonable juror could have interpreted the instruction. *Id.,* 529.

Here, we agree with defendant's contention that the court erred in its presentment of the rebuttable presumptions to the jury. The first presumption should not have been given at all since there is no evidence that would have allowed the jury to utilize this presumption. Because the subject Medicaid claims were all made by means of computerized billing, only the second rebuttable presumption was arguably applicable to this case.

As for this second presumption, the trial court correctly instructed the jury that it applies to persons making the claim by means of computerized billing. However, the claims at issue in this case were all made by Drs. Tocco and Kelly. The jury was instructed that defendant's criminal responsibility was based on his conduct in conspiring to and causing Drs. Tocco and Kelly to make or present the claims. Hence, the trial court's prefatory language that the jury could consider the rebuttable presumption as evidence of defendant's knowledge (rather than Drs. Tocco and Kelly) was error. This error, however, did not cause manifest injustice. The presumption was only permissive and would only have permitted the jury to infer that the person making

the claim did so knowingly. In essence, it allowed the jury to infer that the persons making the claims had knowledge of the claims submitted to Medicaid by means of a computer tape, despite the fact that someone else, such as the third-party billing service here, actually put the billing information onto the tape. Since the evidence was overwhelming that Drs. Tocco and Kelly actually made the claims, it is not reasonably possible that the jury would have utilized the presumption to infer that defendant made them. Further, the central issue at trial was whether defendant had knowledge that the claims made by Drs. Tocco and Kelly were false. Here also, the evidence against defendant was overwhelming.

Read in their entirety, we conclude that a reasonable juror would not have interpreted the instructions as shifting the burden of persuasion to defendant. Since we find no injustice, we do not reverse on this issue. We do, however, take this opportunity to caution the bench and bar to carefully examine statutory presumptions before using them in order to insure their appropriateness to the case at hand.

II

Defendant also claims that the trial court erred by allowing the prosecutor to admit evidence obtained as a result of a grand jury subpoena. This issue was previously raised and addressed by this Court in an interlocutory appeal. See *People* v *Freedland*, unpublished per curiam of the Court of Appeals decided 4/29/86, docket No. 79865, lv den 426 Mich 858 (1986). There have been no material changes in the facts since the prior appeal. Accordingly, we hold that the law of the case doctrine precludes us from reviewing this issue. *CAF Investment Co* v *Saginaw Twp*, 410 Mich 428,

454; 302 NW2d 164 (1981); *Muilenberg* v *The Upjohn Co*, 169 Mich App 636, 641; 426 NW2d 767 (1988), lv den 432 Mich 889 (1989). Defendant's only recourse on this issue, if any, is to seek leave to appeal to the Supreme Court. See *Tebo* v *Havlik*, 418 Mich 350, 379-381 n 17 and 18; 343 NW2d 181 (1984) (Levin, J., dissenting).

Affirmed.

/s/ John H. Shepherd
/s/ Martin M. Doctoroff

***[1989 CONCURRING]* OPINION**

R. R. LAMB, J. (concurring).

I concur with the result reached by the majority, but write separately to express disagreement with the majority's holding that the trial court's instruction on the second presumption was error because it was unwarranted by the evidence.

The prosecution advanced the theory that defendant was guilty of Medicaid fraud as an aider and abettor. In order to prove defendant's guilt on this theory, it would be necessary to show that the crime was committed; i.e. that Drs. Tocca [*sic*] and Kelly knowingly submitted false claims to Medicaid. Since the billing was done using computerized tapes based on Drs. Tocca's and Kelly's submitted data, the second presumption was appropriate for the jury to use in determining that the crime, which defendant allegedly had aided and abetted, was actually committed. I would find no error in the trial court's instruction on the second presumption.

/s/ Richard Ryan Lamb

APPENDIX C

[1990] ORDER DENYING LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Entered April 24, 1990)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JOEL FREEDLAND, Defendant-Appellant and GRIGGS CLINIC, P.C., Defendant — SC: 86963; COA: 99983; LC: 83-02469)

Dorothy Comstock Riley, Chief Justice; Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Levin and Cavanagh, JJ., would grant leave to appeal.

(*Certification Omitted*)

APPENDIX D

[1986] ORDER DENYING LEAVE TO APPEAL

(State of Michigan — Supreme Court)

(Entered September 23, 1986)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JOEL FREEDLAND and GRIGGS CLINIC, P.C., a professional corporation, Defendants-Appellants — SC: 78673; COA: 79865; LC: 83-02469)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 23rd day of September in the year of our Lord one thousand nine hundred and eighty-six.

Present the Honorable:
G. MENNEN WILLIAMS, Chief Justice; CHARLES L. LEVIN, JAMES H. BRICKLEY, MICHAEL F. CAVANAGH, PATRICIA J. BOYLE, DOROTHY COMSTOCK RILEY, DENNIS W. ARCHER, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should now be reviewed by this Court.

Levin, J., would grant leave to appeal.

(*Certification Omitted*)

APPENDIX E

OPINION

(State of Michigan – Recorder's Court – City of Detroit)

(Dated June 26, 1984)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, v JOEL EDWARD FREEDLAND and GRIGGS CLINIC, P.C., a Michigan Professional Corp., Defendant — No. 83-02469)

Defendants, JOEL EDWARD FREEDLAND, a physician and GRIGGS CLINIC, P.C., a Michigan Professional Corporation of which defendant FREEDLAND was a principal, were charged in an Information with one (1) count of conspiracy to obtain payment of false, fictitious and/or fraudulent claims under the Medicaid Act, MCL 400.606, and with seventy-nine (79) counts of presenting false, fictitious and/or fraudulent claims for payment under another provision of the Act.

A number of motions have been filed on behalf of defendants. Included among these are: (1) a Motion for Discovery and Inspection of "any and all physical documentary or tangible evidence" pertaining to the cause which is in the possession of the police or prosecuting officials in charge or which have been turned over to any other "person, agency or institution," all statements, admissions of defendant, addresses of witnesses named in the Information who did not testify at the preliminary examination, the arrest and conviction records of any such witnesses, including juvenile contacts of such witnesses, a prosecution statement indicating any considerations or promises made for their testimony, and any statements of persons interviewed in connection with the investigation; (2) a Motion to

Dismiss the "medical judgment" counts, that is to say, all counts which arose out of the assertion that defendants made or presented claims for services which were not medically necessary; and (3) a Motion to Suppress evidence and quash information based upon the contention that the information was based upon evidence gathered under a grand jury subpoena, and that such use of the grand jury subpoena was improper, that it constituted abuse of the grand jury's power and violated defendant's constitutional rights under the Fourth Amendment.

The last of the above-mentioned motions is, in the opinion of the Court, the most troublesome among them. Discussion and treatment of that motion will be deferred to the concluding portions of this opinion. Therefore, the Court will first inquire into the merits of the motion for discovery. It should be kept in mind that should either of the dispositive motions made by defendant be granted, any decision by this Court that defendant is entitled to any given item or items of discovery will not result in any order to that effect.

Defendant aptly cites case authority for the proposition that the "trend in Michigan and other states is toward broader criminal discovery." (*See, People* v *Brownings* (On Rehearing), 108 Mich App 281, 307 (1981), and other cases.) However, this does not mean that the prosecution is completely at the beck and call of the defense in this respect. The trial court must exercise discretion and a sense of reasonableness. Looking at defendant's motion with particularity, the Court concludes that defendants are entitled to the items requested in Paragraphs 3(b) and 3(c). As to the items requested in Paragraph 3(a), the Court holds that defendants are entitled to the items requested provided that they relate to defendants FREEDLAND or GRIGGS

CLINIC, P.C., but not to include the Medicare Processing Manuals or any information requested by Medicare, for the reason that the essentiality of these last-mentioned items to the defense is not potent on the fact of the motion.

The Court will hold that the conviction records of those persons or witnesses referred to in Paragraph 3(d) shall be furnished to the defendant in order that the same may be examined for impeachment data; however, disclosure shall be limited as provided in Rule 609, Michigan Rules of Evidence, and no information on arrests not resulting in conviction nor on juvenile "contacts" which did not result in any adjudication against a witness in this case shall be disclosed, nor shall any juvenile court adjudication be disclosed as to any witness on any offense not within the scope of MRE 609(d).

For the purpose of aiding the defense in testing the credibility of witnesses, the Court will grant the request set forth in paragraph 3(e), and for the purpose of aiding the defendants in the preparation of their defenses, the items requested in paragraph 3(f) will be granted.

Now as to defendant JOEL EDWARD FREEDLAND's Motion to Dismiss Counts 2, 4, 6, 7, 24, 27, 29, 30, 32, 37, 39, 41, 46, 55, 56, 58, 61, and 65-80 as against him, it is contended that these charges cannot be maintained for the reason that the statute under which these counts are laid, MCL 400.67, when read in conjunction with MCL 400.602 and MCL 400.608, allows a criminal conviction without a finding of "actual criminal intent on part of the defendant." He contends further that the evidence adduced at the preliminary examination failed to show that this defendant knew that the x-rays and/or physical examination, and/or medical histories were

not performed and therefore there was no criminal intent on his part.

Now, based upon this Court's understanding of this case from the lengthy transcript of the preliminary examination record and the numerous exhibits filed as indicated by the same record, this case involved the operation of a medical clinic operating as a professional corporation of which the defendant JOEL EDWARD FREEDLAND was the principal if not the sole shareholder. The fact that there were other persons performing services in the clinic, including, it appears other physicians, it was not unreasonable on the part of the examining magistrate to infer that the principal, defendant FREEDLAND, had knowledge of the patients' presence in the office, general knowledge of the fact that charges were made for services purportedly performed and of the fact that billings were made for these purported services. To conclude otherwise would be to conclude that by incorporating a professional could abdicate all responsibility for professional services. The professional services corporation statute, MCL 450.221 et seq, by no means contemplates such a result. In fact Section 6 specifically negates that idea and holds personally accountable officers and shareholders of such a corporation.

The statute, MCL 400.601 (Sec. 3) specifically prohibits anyone from "knowingly" making or causing to be made a false statement or representation to obtain the benefits of "medicaid." Sec. 5 prohibits anyone from "knowingly or willfully" making or inducing others to make false statements in regard to these benefits; Sec. 6 prohibits agreements and conspiracies of like import; and Sec. 7 prohibits the making or presenting of a false claim knowing it to be false. The element of intent is implicit in all of these actions. Thus it is not at all true, as defendant argues, that the statute permits a conviction without criminal intent.

Given a small amount of knowledge which must, of necessity, be presumed under the circumstances, it was reasonable for the magistrate to infer sufficient intent on the part of the defendant to submit the billings in question regardless of whether he was satisfied that the services were performed. Such an inference of intent is sufficient to support that element for purposes of preliminary examination. *See, e.g., People* v *Nelson*, 123 Mich App 649 (1983). There is no necessity to prove any element of the offense or defendant's guilt beyond a reasonable doubt at the preliminary examination. The facts adduced at preliminary examination are not substantially different from those evidenced at preliminary examination in *In re Wayne County Prosecutor*, 121 Mich App 798 (1982), and which were concluded by the Court of Appeals to support the bind over order. This Court does not, therefore, agree with the defendant either that the statute permits a finding of guilt without criminal intent or that intent was not sufficiently shown at the preliminary examination. For this reason dismissal will not be ordered on this asserted basis.

Now we come to that defense motion which the Court has, earlier in this opinion, indicated as the most troublesome, the Motion to Quash the Information or in the alternative to Suppress Evidence and Dismiss. The grounds asserted, which for emphasis, are restated here, are in effect that the information is based improperly upon evidence seized by a grand jury subpoena and thereafter used outside the scope of grand jury's purposes. The defense makes the plain assertion that the grand jury at the behest of the prosecution subpoenaed the documents which ultimately constituted the basis for the complaint and warrant in this case without any legitimate grand jury purpose in mind. Indeed the prosecution seems to admit this assertion claiming as the

only excuse for this conduct the fact that the grand jury was about to expire. The question therefore is a clear one albeit that it appears after considerable research that it is one of first impression.

Before entering upon a discussion of this motion, it may be worth noting that in this state a valid order binding a defendant over for trial following preliminary examination requires that the crime be established and that probable cause be shown only on legally admissible evidence. *People* v *Gwinn*, 47 Mich App 134 (1973) and *People* v *Charles D. Walker*, 385 Mich 565 (1971).

Thus, if defendant's contention that the seizure of the evidence by the grand jury without any valid purpose and its surrender of that evidence to the prosecutor was constitutionally invalid, is correct, and if the order binding the defendant over for trial rested solely on that evidence, an order granting the Motion to Quash the Information would appear to be in order.

The aspect of this case which triggers the most concern derives from the fact that the prosecution through its use of the grand jury was able to obtain from the defendants evidence against them which it could not have obtained by means of a search warrant which would have required a showing of probable cause before a magistrate who was duly authorized, upon such showing, to issue a search warrant. In the opinion of this Court, this constituted a violation of not only the Fourth Amendment to the Federal Constitution but a violation of the Michigan Constitution as well. (See Const 1963, Art 1, Sec 11), both of which undertake to protect our citizens from unreasonable search and seizure.

Many years ago, the United States Supreme Court in *Johnson* v *United States*, 333 US 10, 14; 92 L Ed 2d

4436, 440 (1947) emphasized the importance of the magistrate in the evidence gathering process by saying:

> "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officer in making a search without a warrant would reduce the (4th) Amendment to a nullity. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not a policeman or Government enforcement agent."

The degree of apparent intrigue between the attorney general and grand jury in this case was such as would appear to disturb almost any one's sense of justice and fair play. Nowhere in the plan on the part of the prosecution to obtain the evidence did the judiciary play a role. Despite the fact that the grand juries in this County as elsewhere are under the supervision of the circuit judge at no time, as far as this Court has been informed, did the attorney general make a request of the judge to authorize the release of these records by the grand jury. Just as the United States Supreme Court expressed in *Johnson*, this Court feels that the judicial officer in this case should have a role in the seizure of the evidence in question.

It is diffucult to forget that grand juries have enormous powers. Such powers are not unlimited, however. A criminal law text widely used in Michigan makes reference to that fact in the following manner:

> "No matter how respectable or eminent the citizens may be who comprise the grand jury, they are not above the law, and the people have not delegated to them arbitrary or plenary powers to do that, under an ancient form, which

> they have not a legal right to do." 1 Mich Cr L & Proc, Ch 8, Sec 135.

If a grand jury, without any purpose whatever to act upon evidence subpoenaed by it, simply, as it apparently did in this case, issued its subpoena to effect the same purposes as a search warrant, its power would, indeed, be limitless. Our Supreme Court held unequivocally, in *Oakland County* v *Bice*, 386 Mich 143, 149 (1971) that a subpoena is not a substitute for a warrant by declaring:

> "We hold that a subpoena duces tecum cannot perform the office of a warrant to search and seize and hence the seizure in this case was unlawful."

The use of the subpoena duces tecum in this instance runs counter to the law of *Bice*. This Court is constrained to hold, and does hold as a matter of law, therefore, that the use of the Grand Jury Subpoena to seize the records in question, absent the express approval of the supervising judge of the grand jury, was unlawful. Accordingly, it will order the same suppressed as evidence in this case.

Inasmuch as it does not appear that aside from the records in question, there is sufficient evidence to support the charges against the defendants, the Motion to Quash the Information will be granted, and the case dismissed.

The Court is aware of the high public interest in prosecutions of this nature as well as the importance of the constitutional questions provoked by the motions. Consequently, it will be inclined to stay for a reasonable period the execution of its order of quashal.

Finally, in the foregoing discussion the Court has expressed its opinions on other motions in this cause.

However, inasmuch as these motions will be rendered moot by the entry of an order quashing the information and dismissing the case, such additional motions will be dismissed without prejudice, pending the finality of the order of quashal and dismissal.

/s/ Samuel C. Gardner

DATED: June 26, 1984

APPENDIX F

ORDER

(State of Michigan – Recorder's Court – City of Detroit)

(Dated June 26, 1984)

(PEOPLE OF THE STATE OF MICHIGAN, Plaintiff, v JOEL EDWARD FREEDLAND and GRIGGS CLINIC, P.C., a Michigan Professional Corp., Defendants — No. 83-02469)

At a session of said Court held in the Frank Murphy Hall of Justice at the City of Detroit, Michigan on June 26, 1984.

PRESENT: HONORABLE SAMUEL C. GARDNER,
Judge of Recorder's Court.

In the above-entitled cause for the reasons set forth in the opinions heretofore rendered;

IT IS HEREBY ORDERED that the motion of defendants, JOEL EDWARD FREEDLAND and GRIGGS CLINIC, P.C., for quashal of the information filed herein be, and the same hereby is GRANTED and the cause DISMISSED.

IT IS FURTHER ORDERED that all remaining motions filed by said defendants be, and the same hereby are DISMISSED.

/s/ Samuel C. Gardner
Judge of Recorder's Court

APPENDIX G

GRAND JURY SUBPOENA

(State of Michigan — Circuit Court — County of Wayne)

(Dated February 16, 1982)

TO: JOEL EDWARD FREEDLAND, D.O., P.C.
a/k/a Griggs Medical Clinic
c/o Joel Edward Freedland, D.O.
10300 W. 7 Mile Road, Detroit, Michigan

GREETINGS:

IN THE NAME OF THE PEOPLE
OF THE STATE OF MICHIGAN:

You are hereby commanded to appear before the CITIZENS GRAND JURY FOR THE COUNTY OF WAYNE Room 1125, Lafayette Building, 149 Michigan Avenue, Detroit, Michigan, on *Tuesday*, the *16th* day of *February*, *1982*, at *10:00* o'clock, *A*.M., then and there to testify and give evidence, and to bring with you: *Those materials described on the reverse side hereof.**

HEREOF FAIL NOT. Failure to attend will subject you to fine and imprisonment for contempt of Court.

This Subpoena is issued on behalf of the PEOPLE OF THE STATE OF MICHIGAN.

By: /s/ Nelson W. Westrin
Assistant Attorney General, State of Michigan

DATE: *February 8, 1982*

NOTICE: You have the right to have a lawyer present in the hearing room during your examina-

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* [*Printer's Note*: Description omitted in this reproduction.]

tion. If you are unable to afford an attorney, one will be appointed for you at public expense by the Presiding Judge of this Court if you so desire.

WITNESS, the seal of the Circuit Court of Wayne County by authority of the Presiding Judge. (SEAL)

APPENDIX H

GRAND JURY AUTHORIZATION FOR RELEASE OF RECORDS

(State of Michigan — Circuit Court — County of Wayne)

(Filed April 29, 1982)

(IN RE: WAYNE COUNTY CITIZENS GRAND JURY — File No. 81-116363-PZ)

WHEREAS, we, the Wayne County Citizens Grand Jury issued a subpoena duces tecum to Joel Edward Freedland, D.O., P.C., a/k/a Griggs Medical Clinic, and Peter Tocco, III, D.O., for the production of certain documents and medical records, and

WHEREAS, certain documents and medical records were produced by Joel Edward Freedland, D.O., a/k/a Griggs Medical Clinic, pursuant to said subpoena duces tecum, and

WHEREAS, the Department of Attorney General has conducted an independent criminal investigation involving Joel Edward Freedland, D.O., *et al*, and has represented that its criminal investigation has been concluded and that it is prepared to proceed criminally against Joel Freedland, D.O., *et al*, by complaint and warrant, and

WHEREAS, the Department of Attorney General has requested that this grand jury release said documents and records produced pursuant to said grand jury subpoena duces tecum to the Department of Attorney General for use in the criminal prosecution of Joel Edward Freedland, D.O., *et al*, and

WHEREAS, we, the Wayne County Citizens Grand Jury, are interested in promoting the efficient and effective investigation and prosecution of all criminal activity occurring in Wayne County, and

WHEREAS, the Wayne County Citizens Grand Jury has accordingly considered the Attorney General's request and has voted unanimously to comply with said request.

NOW THEREFORE, all documents produced pursuant to said subpoena duces tecum are hereby released by the Wayne County Citizens Grand Jury to the Department of Attorney General for use in the criminal prosecution of Joel Edward Freedland, D.O., *et al*, by Complaint and Warrant.

/s/ Andrea E. Wojack,
Acting Foreman
Wayne County Citizens Grand Jury

Dated: April 28, 1982

[Certification Omitted]